SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-173

COMMONWEALTH OF KENTUCKY - Petitioner

versus

NORWOOD WELLS - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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TABLE OF CASES AND AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

NORWOOD WELLS - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issued to review the judgment of the Court of Appeals of Kentucky reversing the conviction of the respondent in the Muhlenberg Circuit Court, 45th Judicial Circuit of Kentucky.

OPINION BELOW

The judgment of the trial court was entered on June 28, 1978 and is found in the Appendix on pages 9-11. An opinion affirming (not to be published) was rendered by the Kentucky Court of Appeals on July 7, 1978 and is found in the Appendix beginning at page 12. The respondent filed a motion for discretionary review in the Supreme Court of Kentucky which was granted by an opinion and order entered on November

21, 1978 and which is found in the Appendix on page 18. On remand by the Supreme Court of Kentucky to the Court of Appeals of Kentucky, the judgment was reversed and the case remanded to the trial court for a new trial. The opinion of the Court of Appeals of Kentucky reversing and remanding is found in the Appendix beginning at pages 19-20. The mandate of the Court of Appeals of Kentucky is found in the Appendix at page 21.

JURISDICTION

The judgment of the Court of Appeals of Kentucky, the subject of this petition, was entered on April 30, 1979. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Court of Appeals of Kentucky erred in applying to this case the Kentucky Supreme Court's decision in *Whorton* v. *Commonwealth*, Ky., 570 S. W. 2d 627 (1978), which misinterpreted the scope and effect of this court's decision in *Taylor* v. *Kentucky*, 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 6, 1976, at approximately 8:20 p.m., the respondent, Norwood Wells, and a companion, David Stewart, walked into the Red Ace Service Station in Greenville, Kentucky. The attendant, Terry Doss, testified that Wells approached him, stuck something in his side, and demanded the money from the service station cash register. Doss testified that he gave the appellant Wells $180 out of the cash register. Doss immediately notified the Muhlenberg County Sheriffs' Office of the robbery. As a result, Willie Parker, a deputy sheriff, stopped a car occupied by the respondent, Stewart and a third person, Silas Vincent. The officer examined the front seat of the car and observed a pocket knife allegedly belonging to Stewart. With probable cause established, the sheriff, Bill Cornelius, searched the car and found most of the money taken in the robbery under the dash board.

Silas Vincent, who was driving the automobile, admitted being with Wells and Stewart on the evening of the robbery and of having driven them to the Red Ace Service Station. He testified that they got out of the car to use the telephone, and that it was only after the three were taken to the Muhlenberg County Jail

that Wells and Stewart admitted to him that they had robbed the Red Ace Service Station.

Stewart testified in his own behalf. Wells did not take the stand. Stewart admitted that he was present in the service station at the time of the robbery; however, he denied any prior knowledge of the robbery and specifically denied any involvement in the robbery itself. Stewart said that he did not realize what his companion Wells was doing at the time the robbery took place.

At the conclusion of the evidence the case was submitted to a jury which found the respondent guilty and sentenced him to 10 years in the penitentiary, and found Stewart guilty and sentenced him to a term of 7 years.

On direct appeal to the Court of Appeals of Kentucky the judgment was affirmed. Wells and Stewart each filed a motion for discretionary review in the Supreme Court of Kentucky. The motion was granted and the Supreme Court of Kentucky issued the following order:

> "The decision of the Court of Appeals rendered July 7, 1978, is now vacated, and this proceeding is remanded to the Court of Appeals for reconsideration in light of this court's opinion in *Luttrell* v. *Commonwealth,* Ky., 554 S. W. 2d 75 (1977), and *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978)."

On remand, the Court of Appeals of Kentucky reversed and remanded for a new trial stating as follows:

> "Wells requested an instruction on the presumption of innocence, but the instruction was not given. This is reversible error and a new trial is therefore required. *Whorton, supra.*"

The Court of Appeals of Kentucky erred in applying to this case the Kentucky Supreme Court's Opinion in *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978), which misinterpreted the scope and effect of this court's decision in *Taylor* v. *Kentucky,* 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). In *Whorton* v. *Commonwealth,* the Kentucky Supreme Court interpreted *Taylor* v. *Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error." (570 S. W. 2d at 633). This interpretation of *Taylor* v. *Kentucky* therefore required automatic reversal in every criminal case where a request for such an instruction was denied regardless of the circumstances of the case.

It has been the petitioner's position that the decision in *Taylor* v. *Kentucky* did not create any newly declared constitutional requirement that a rejected instruction on the presumption of innocence requires automatic reversal of a state conviction. The petitioner's position was upheld by this court in *Kentucky* v. *Harold Whorton,* 441 U. S. —— (1979), per curiam opinion rendered May 21, 1979. In its opinion this court said:

> ". . . The failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor,* such a failure must be evaluated in light of

> the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial.
>
> "The Kentucky Supreme Court thus erred in interpreting *Taylor* to hold that the due process clause of the Fourteenth Amendment absolutely requires that an instruction on the presumption of innocence be given in every criminal case. 441 U. S. at —— (Slip Opinion at 4)."

The judgment of the Kentucky Supreme Court in *Whorton* was vacated and the case remanded for further consideration in light of this decision.*

In the case at bar the evidence presented by the prosecution was far more substantial than that presented in *Taylor* v. *Kentucky*. In *Taylor* the evidence for both sides constituted a "swearing contest". In the case at bar the evidence against the respondent was overwhelming. The victim and the companions of the respondent testified as to his guilt and the stolen money was found in the automobile in which he was apprehended. There were no suggestions made in this case that respondent's mere status as a defendant would in itself tend to establish guilt—unlike *Taylor* v. *Kentucky*.

*On June 4, 1979 this court granted petitioner's petition for a writ of certiorari in the following cases, and vacated and remanded these cases to the Supreme Court of Kentucky for further consideration in the light of *Kentucky* v. *Whorton, supra; Kentucky* v. *Barry Vaughn Williams*, No. 78-1084; *Kentucky* v. *James Ronald Avery*, No. 78-1084; *Kentucky* v. *Ralph Brannon*, No. 78-750; *Kentucky* v. *Edgar Gilbert Miller*, No. 78-1493.

This Court's decision in *Taylor* v. *Kentucky* turned solely upon its unique and unusual facts. The numerous extraneous circumstances which occurred during the trial in the *Taylor* case were specifically noted by this Court, and when they were considered together, established the basis for the violation of Taylor's constitutional rights. The petitioner maintains that this Court's decision in *Kentucky* v. *Whorton* supports the position that absence such similar factual circumstances during the trial no such constitutional violations would occur. As just previously noted the circumstances of this case are not at all similar to those in *Taylor* v. *Kentucky*. Therefore, this case should have been considered on its own facts and circumstances and not automatically reversed because the trial court refused to give the requested instruction on the presumption of innocence.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Court should grant a writ of certiorari in this case based upon its decision in *Kentucky* v. *Whorton*, 441 U. S. —— (1979), vacate the judgment, and remand this action to the Kentucky Court of Appeals.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

CARL T. MILLER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioner

PROOF OF SERVICE

I, Carl T. Miller, Jr., one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this ____ day of July, 1979, to Hon. William M. Radigan, Assistant Public Advocate, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Respondent.

CARL T. MILLER, JR.
Assistant Attorney General

APPENDIX

MUHLENBERG CIRCUIT COURT

45TH JUDICIAL CIRCUIT

Indictment No. 1112

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

NORWOOD WELLS - - - - - - - *Defendant*

JUDGMENT OF CONVICTION

On the 28th day of June, 1977, defendant, Norwood Wells having appeared in open court with his court appointed attorney, Hon. Lucien Cisney and Hon. Dan Cornette having appeared as attorney for the Commonwealth, the Court informed the defendant that he had been found guilty of the crime of second degree robbery by jury verdict and that his punishment had been fixed at ten years imprisonment. The Court then advised the defendant and his attorney that a presentencing investigation had been previously ordered and that defendant and his attorney had previously been advised of the factual contents and conclusions of the written report of the Probation and Parole Officer and the Court then inquired of the defendant and his attorney whether they needed any more time in which to controvert the factual contents and conclusions contained therein. Whereupon, the attorney for defendant advised the Court that they did not request any more time. The Court then noted that defendant, by counsel, had previously filed a motion that the court withhold rendition of judgment and place the defendant on probation and the Court having considered the written presentencing report as sup-

plied by the Probation and Parole Officer and being otherwise sufficiently advised overruled defendant's motion for probation.

The motion for reduction of sentence of the Defendant was overruled. The motion of Defendant for a new trial was also overruled.

Whereupon the Court inquired of the defendant and his attorney whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in defendant's behalf to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the Court:

Adjudged that the Defendant is guilty of the crime of second degree robbery, and he shall be imprisoned for a period of ten years.

It is further ordered and adjudged that the Muhlenberg County Sheriff shall deliver the defendant to the custody of Department of Justice hereunder at such location in the State as the Department shall designate.

The Defendant has been confined in jail for 202 days on this charge and he shall receive credit for same as provided by law.

After fixing sentence, the Court informed the defendant that he has a right to appeal to the Court of Appeals of Kentucky with assistance of counsel, that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him, that an appeal must be taken within ten (10) days of this judgment, and that the Clerk of the Court will prepare and file a notice of appeal on his behalf within that time if he so requests.

Enter this the 28th day of June, 1977.

/s/ B. R. Paxton, Judge
Muhlenberg Circuit Court

COMMONWEALTH OF KENTUCKY }
COUNTY OF MUHLENBERG } ss

I, Thelma B. Young, Clerk of the Muhlenberg Circuit Court, do hereby certify that the foregoing is a true copy of a Judgment of Conviction of said court, the original of which is now of record in my office in Commonwealth Order Book 18, Page 260.

Witness my hand and seal this the 30th day of June, 1977.

/s/ Diane Hammond, D.C.
Thelma B. Young, Clerk
Muhlenberg Circuit Court

SEAL

I hereby certify that I have handed two certified copies of the above to the Muhlenberg County Sheriff and one copy to Lucien Cisney and one copy to the Muhlenberg County Jailer, this June 30th, 1977.

/s/ Diane Hammond, D.C.

OPINION RENDERED: JULY 7, 1978
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

CA-1963-MR

DAVID WAYNE STEWART - - - - *Appellant*

Appeal from Muhlenberg Circuit Court
v. *Hon. B. R. Paxton, Judge*
Indictment No. 1112

COMMONWEALTH OF KENTUCKY - - - *Appellee*

CA-1975-MR

NORWOOD WELLS - - - - - - - *Appellant*

Appeal from Muhlenberg Circuit Court
v. *Hon. B. R. Paxton, Judge*
Indictment No. 1112

COMMONWEALTH OF KENTUCKY - - - *Appellee*

AFFIRMING—Received July 7, 1979

BEFORE: MARTIN, Chief Judge, REYNOLDS and WINTERSHEIMER, Judges

MARTIN, Chief Judge. David Wayne Stewart and Norwood Wells were charged with the armed robbery of the Red Ace Service Station in Greenville, in Muhlenberg County. A third defendant, Silas Vincent, was indicted; however, the charges against him were dropped when he testified for the Commonwealth. The jury returned a verdict of guilty as to both defendants on the lesser included charge of robbery in the second degree. Wells was sentenced to ten years in the penitentiary, and Stewart was sentenced to seven years.

The Commonwealth proved that on December 6, 1976, at approximately 8:20 P.M., Norwood Wells and David Stewart walked into the Red Ace Service Station in Greenville. The attendant, Terry Doss, testified that Wells approached him, stuck something into his side, and demanded the money from the service station cash register. Doss testified that he gave the appellant Wells $180.00 out of the cash register. Doss immediately notified the Muhlenberg County Sheriff's office of the robbery. As a result, Willie Parker, a deputy sheriff, stopped a car occupied by the appellants, Wells and Stewart, and Vincent. He examined the front seat of the car and observed a pocket knife allegedly belonging to Stewart. With probable cause established, the sheriff, Bill Cornelius, searched the car and found most of the money taken in the robbery under the dashboard.

The most damaging evidence to the appellants was the testimony of their companion Vincent. He admitted being with them on the evening of the robbery and having driven them to the Red Ace Service Station. He testified that they got out of the car to use the telephone. It was only after all three were taken to the Muhlenberg County Jail that Wells and Stewart admitted to him that they had robbed the Red Ace Service Station.

Stewart testified in his own behalf. Wells did not take the stand. Stewart admitted that he was present in the service station at the time of the robbery; however, he denied any prior knowledge of the robbery and specifically denied any involvement in the robbery itself. His explanation to the circumstances surrounding the robbery was that he did not realize what his co-defendant was doing at the time the robbery took place.

The appellants argue that the trial court abused its discretion in denying them a separate trial. However, at the time the motion was filed, appellants presented no affidavit or other evidence in support of the motion. It has long been the rule in this Commonwealth that a motion for a separate trial will be granted only when it is demonstrated to the trial court that the movant will be prejudiced in some

way by the joint trial. *See* RCr. 9.16, *Rachel* v. *Commonwealth,* Ky., 523 S. W. 2d 395 (1975). The procedure to be followed by a trial judge when a motion for a separate trial is made was set out in *Ware* v. *Commonwealth,* Ky., 537 S. W. 2d 174, at 176-7 (1976):

> RCr 9.16 requires separate trials if it appears that a defendant or the Commonwealth "will be prejudiced" by a joinder of offenses or of defendants for trial. Ware cites the following excerpt from *Hoskins* v. *Commonwealth,* Ky., 374 S. W. 2d 839, 842 (1964):
>
> "The prevailing rule appears to be that the mere fact that evidence competent as to one defendant but incompetent as to the other may be introduced is not alone sufficient to establish such prejudice as to require the granting of separate trials. Ordinarily there must be some additional factor, such as that the defendants have antagonistic defenses, *or that the evidence as to one defendant tends directly to incriminate the other,* e.g., one defendant's admissions directly implicate the other." (Emphasis added.)

A good deal of tripe has grown up around the question of what sort of prejudice should entitle a defendant to a separate trial. Perhaps the rule itself is not sufficiently explicit. "Prejudiced" means unfairly prejudiced. A defendant is prejudiced, of course, by being tried at all. Despite any contrary inference that might be drawn from the foregoing statement in *Hoskins,* neither antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice. In this instance we do not have antagonistic defenses, so that subject need not be further pursued beyond this observation: *That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial.* If one is lying, it is easier for the truth to be determined if all are required to be tried together.

The most common example of improper joinder by reason of testimony pertaining to another defendant arises in connection with a confession that is admissible against one but not the other. This does not occur, however, when all of the evidence against one is equally admissible against the other, or when the evidence in question can be and is excluded by the trial court. Nor does it occur when the offending evidence is such that an admonition will reasonably suffice to limit or exclude its consideration with respect to the defendant against whom it would not be admissible in a separate trial.

In the present case, the proof established that these defendants were together at the time of the robbery. The fact that one chose to testify and explain his position does not of itself deprive the other defendant of a fair trial if they are tried together. We believe that the trial court properly denied the motion for separate trials.

The second major issue raised by appellants is the failure of the trial court to give the appellants' tendered instruction on the presumption of innocence. This issue was recently considered in the case of *Taylor* v. *Kentucky,* ____ U. S. ____, 46 U.S.L.W. 4528 (May 30, 1978). The facts of the present case are significantly different from *Taylor.* There, the prosecutor's abuse gave rise to an inference of guilt from the opening of the trial through his closing argument. To the contrary, in the present case the trial court conducted a very orderly proceeding in which the substantive rights of the appellants were protected throughout. Both appellants received a fair trial as guaranteed by their right to due process.

Appellants further argue that the closing argument of the Commonwealth's Attorney exceeded the reasonable grounds of discretion. We have considered this argument and have examined these statements in light of the standard approved in *Lynem* v. *Commonwealth*, Ky., ——, S. W. 2d ——, 25 Ky. L. Summ. 5 (April 11, 1978). We find that the comments of the Commonwealth's Attorney were not prejudicial. The standard requires that the prosecutor not express his personal opinion as to guilt or innocence or to the truth or falsity of any testimony. It does allow him to make arguments on basic matters within the record and such matters of common public knowledge of which the court may take judicial notice. As pointed out in *Hunt* v. *Commonwealth*, Ky., 466 S. W. 2d 957 (1971), a reasonable comment may be allowed to the prosecutor.

The appellant Stewart raises a question as to whether he received a fair trial because his silence was used against him at the trial. The rationale of *Doyle* v. *Ohio*, 426 U. S. 610, 618-619, 96 S. Ct. 224, 225, 45 L. Ed. 2d 91, 98 (1976), requires that a conviction be reversed where the prosecution attempts to draw an inference of guilt from a defendant's silence at the time of his arrest. In the present case a complete review of the record indicates that the situation was not so grave as to constitute a denial of Stewart's substantial rights. We believe that the prosecutor's comment to which Stewart objected was an offhanded comment which was insufficient to taint the trial and thereby warrant a reversal.

Stewart also argues that the trial court erred in allowing hearsay evidence to be introduced. We consider this argument to be without merit.

Finally, appellants contend that the trial court denied them probation without making a finding as required by KRS 533.010(2).

In light of the decision in *Brewer* v. *Commonwealth*, Ky., 550 S. W. 2d 474 (1977), a fairly restricted standard

of sentencing has been imposed. We believe that an examination of the judgment dated June 28, 1977, and the affidavit filed with this court proves that the trial court sufficiently complied with the mandatory requirements of the *Brewer* case.

AFFIRMED.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

78-SC-500-D

NORWOOD WELLS - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

On Review from Court of Appeals
No. CA-1975-MR
(Muhlenberg Circuit Court 1112)

OPINION AND ORDER—Docketed November 21, 1978

The motion of Norwood Wells for a review of the decision of the Court of Appeals is granted.

The decision of the Court of Appeals rendered July 7, 1978, is now vacated, and this proceeding is remanded to the Court of Appeals for reconsideration in light of this court's opinions in Luttrell v. Commonwealth, Ky., 554 S. W. 2d 75 (1977), and Whorton v. Commonwealth, Ky., 570 S. W. 2d 627 (1978).

All concur.

ENTERED November 21, 1978.

/s/ John S. Palmore
Chief Justice

OPINION RENDERED: JANUARY 26, 1979
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. CA-1975-MR

NORWOOD WELLS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Remand from the Supreme Court
Appeal from Muhlenberg Circuit Court
Hon. B. R. Paxton, Judge
Action No. 1112

REVERSING AND REMANDING—Entered April 30, 1979

BEFORE: MARTIN, Chief Judge, REYNOLDS and WINTERSHEIMER, Judges.

MARTIN, Chief Judge. Norwood Wells was convicted of second degree robbery and sentenced to ten years imprisonment. Co-defendant, David Wayne Stewart, was convicted of the same offense and received a prison term of seven years. Both convictions were affirmed by this Court. *Wells* v. *Commonwealth,* CA-1975-MR, (Ky. App., July 7, 1978); *Stewart* v. *Commonwealth,* CA-1963-MR (Ky. App., July 7, 1978). The Supreme Court of Kentucky granted discretionary review, vacated the original decisions and remanded both causes to this Court. *Wells* v. *Commonwealth,* 78-SC-500-D (Ky., November 21, 1978); *Stewart* v. *Com-*

monwealth, 78-SC-429-D (Ky., November 21, 1978). We, therefore, follow the mandate of the Supreme Court and reconsider the two cases in light of *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978), and *Luttrell* v. *Commonwealth,* Ky., 554 S. W. 2d 75 (1977).

Wells requested an instruction on the presumption of innocence, but the instruction was not given. This is reversible error, and a new trial is therefore required. *Whorton, supra.* Wells did not testify in his own defense. The possibility that at a second trial Wells may choose to remain solent will not prevent another joint trial of these co-defendants. *Luttrell, supra.* However, there may be no comment upon such silence either by the prosecution or by defense counsel. *Id.*

The judgment is reversed, and the cause is remanded for a new trial consistent with this opinion.

ALL CONCUR.

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OPINION RENDERED: JANUARY 26, 1979

COURT OF APPEALS OF KENTUCKY

File No. CA-1975-MR

NORWOOD WELLS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Muhlenberg Circuit Court
Hon. B. R. Paxton, Judge
Action No. 1112

MANDATE—Entered April 30, 1979

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It is therefore the mandate of this Court that its ruling, as set forth in the opinion, now be carried out.

JULY 7, 1978—Court of Appeals Affirming Opinion.

AUGUST 25, 1978—Appellant's Petition for Rehearing Denied.

NOVEMBER 21, 1978—Discretionary Review Granted by Supreme Court and Decision Vacated & Remanded to Court of Appeals.

APRIL 24, 1979—Movant's Motion for Discretionary Review by Supreme Court Denied.

/s/ John C. Scott, Clerk

Issued April 27, 1979

(SEAL)